

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)	Case No. 13-0958 SC
)	
MOHSEN MOHAMED and OAKLAND M&M,)	ORDER GRANTING MOTION TO
INC.,)	<u>DISMISS</u>
)	
Plaintiffs,)	
)	
v.)	
)	
AMCO INSURANCE COMPANY and DOES)	
1-20,)	
)	
Defendants.)	
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I. INTRODUCTION

Plaintiffs Mohsen Mohamed and Oakland M&M, Inc. ("M&M" or "Insured") (collectively "Plaintiffs") sued Defendant AMCO Insurance Company ("Defendant") for a variety of common law claims arising from Defendant's refusal to pay benefits under an insurance contract. Now before the Court is Defendant's motion to dismiss Plaintiffs' complaint. ECF No. 1 ("Notice of Removal") Ex. 1 ("Compl.")¹; ECF No. 10 ("MTD"). The matter is fully briefed, ECF

¹ The Court's citations to the complaint refer to the page numbers of the exhibit in which the complaint appears.

Nos. 13 ("Opp'n"), 17 ("Reply"), and appropriate for decision without oral argument, Civ. L.R. 7-1(b). As explained below, the Court GRANTS Defendant's motion.

II. BACKGROUND

This is a dispute over an insurance contract. M&M, a California corporation, obtained a "Premier Businessowners Policy" from AMCO. ECF No. 10-1 (Decl. of Joseph Wucher ISO Def.'s MTD ("Wucher Decl.)) Ex. 1 (the "Policy") at 1-05.² The Policy covers M&M's real property (the "property"), a convenience store and gas station in Oakland. Compl. at 4. Mr. Mohamed owns all of M&M's stock. Id. He is not named as an insured under the Policy's property coverage -- only M&M is. See id.; see also Policy at 1-05 (stating that M&M is the "Named Insured").

On October 17, 2011, a burglary occurred at the property. Compl. at 4. M&M notified Defendant of the burglary and submitted a proof of loss for damages resulting from the burglary. Compl. at 4. Defendant denied M&M's claim on the grounds that its burglary alarm system was "inadequate and deficient" at the time of the burglary, and the Policy will not cover property losses from burglaries unless the insured property is outfitted with a burglary alarm system that fits the Policy's requirements. Id. at 6. M&M disputes Defendant's denial, asserting that it had "an operable alarm system installed at the insured location and . . . an alarm monitoring agreement in force with an independent alarm monitoring

² The Court takes judicial notice of the Policy since it is incorporated by reference into Plaintiffs' complaint. The Exhibit including the Policy is broken up into ECF Nos. 10-1, 10-2, and 10-3, but as it is consecutively paginated, the Court cites to page numbers without reference to the ECF numbers.

1 company." Compl. at 4.

2 In response to the claim's denial, Plaintiffs sued Defendant
3 in state court for breach of contract, breach of the implied
4 covenant of good faith and fair dealing, intentional
5 misrepresentation, and deceit. Defendant removed the suit to
6 federal court. The core of Plaintiffs' complaint is that
7 Defendant, in order to obtain Plaintiffs' business, misrepresented
8 to Plaintiffs that the Policy would cover property losses related
9 to burglaries and robberies, even though Defendant knew it would
10 not. See Compl. at 6-7. Defendant now moves to dismiss, arguing
11 that (1) Mr. Mohamed has no standing to sue for denial of insurance
12 benefits, because he is not an "insured" under the Policy, and (2)
13 Plaintiffs' intentional misrepresentation and deceit claims are not
14 pled with sufficient particularity to satisfy Federal Rule of Civil
15 Procedure 9(b), and in any event, Plaintiffs cannot state claims
16 for those causes of action.

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18 **III. LEGAL STANDARD**

19 **A. Motions to Dismiss**

20 A motion to dismiss under Federal Rule of Civil Procedure
21 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
22 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
23 on the lack of a cognizable legal theory or the absence of
24 sufficient facts alleged under a cognizable legal theory."
25 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
26 1988). "When there are well-pleaded factual allegations, a court
27 should assume their veracity and then determine whether they
28 plausibly give rise to an entitlement to relief." Ashcroft v.

1 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court
2 must accept as true all of the allegations contained in a complaint
3 is inapplicable to legal conclusions. Threadbare recitals of the
4 elements of a cause of action, supported by mere conclusory
5 statements, do not suffice." Id. (citing Bell Atl. Corp. v.
6 Twombly, 550 U.S. 544, 555 (2007)). The court's review is
7 generally "limited to the complaint, materials incorporated into
8 the complaint by reference, and matters of which the court may take
9 judicial notice." Metzler Inv. GMBH v. Corinthian Colls., Inc.,
10 540 F.3d 1049, 1061 (9th Cir. 2008) (citing Tellabs, Inc. v. Makor
11 Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)).

12 **B. Rule 9(b)**

13 Claims sounding in fraud are subject to the heightened
14 pleading requirements of Federal Rule of Civil Procedure 9(b),
15 which requires that a plaintiff alleging fraud "must state with
16 particularity the circumstances constituting fraud." See Kearns v.
17 Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009). "To satisfy
18 Rule 9(b), a pleading must identify the who, what, when, where, and
19 how of the misconduct charged, as well as what is false or
20 misleading about [the purportedly fraudulent] statement, and why it
21 is false." United States ex rel Cafasso v. Gen. Dynamics C4 Sys.,
22 Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks
23 and citations omitted).

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28 **IV. DISCUSSION**

1 **A. Plaintiff Mohamed's Standing**

2 A party's standing to bring a legal challenge is a threshold
3 issue that must be resolved prior to reaching the merits of the
4 party's claim. See Scott v. Pasadena Unified Sch. Dist., 306 F.3d
5 646, 654 (9th Cir. 2002). In order to establish standing, a
6 plaintiff must show that he has suffered the "invasion of a legally
7 protected interest." Id. That interest may be protected by law or
8 by contract. See, e.g., Hatchwell v. Blue Shield of Calif., 198
9 Cal. App. 3d 1027, 1034 (Cal. Ct. App. 1988).

10 Plaintiffs assert that Mr. Mohamed is insured under the Policy
11 because he is the sole owner and shareholder of M&M and therefore
12 meets the Policy's own definition of "insured." Opp'n at 2.
13 Plaintiffs also claim that Gantman v. United Pacific Insurance Co.,
14 232 Cal. App. 3d 1560, 1566 (Cal. Ct. App. 1991), supports their
15 argument that owners or shareholders of a closely held corporation
16 have standing in insurance disputes in which the policy names only
17 the corporation. Id. Defendant replies that (1) while Mr. Mohamed
18 may be insured under the Policy's third-party liability section, he
19 is not an insured under the first-party property loss claim
20 section, which covers burglaries; (2) Mr. Mohamed is not insured by
21 definition under the property loss section of the Policy, because
22 that section's definition of insured is limited to the Named
23 Insured, M&M; and (3) no case law supports Plaintiffs' argument
24 that Mr. Mohamed has standing, under any theory, to bring a claim
25 based on denials of benefits under the Policy. Reply at 2-3.

26 Defendant is right. First, Plaintiffs cite sections of the
27 Policy's third-party liability portion to support their contention
28 that Mr. Mohamed is a "Named Insured" under the policy. See Opp'n

1 at 1-2 (citing Policy at 1-70 (providing that for insured LLCs,
2 managers are insured with respect to their duties as managers)).
3 However, Defendant is correct that because Plaintiffs' insurance
4 claim arises from a burglary at the property, the claim is governed
5 by the first-party property loss section of the Policy, and that
6 section limits who is insured under the Policy to the Named
7 Insured, M&M. Policy at 1-05, 1-06, 1-18. The Policy's definition
8 reaches no further. Id. at 1-05, 1-06.

9 Second, M&M as a corporation is a separate legal entity from
10 Mr. Mohamed, and even if he is the owner and sole shareholder of
11 M&M, he is not interchangeable with M&M as a legal claimant under
12 the Policy. M&M is the only Named Insured under the section of the
13 Policy that would cover a burglary claim. Policy at 1-05, 1-06, 1-
14 18.

15 Third, Plaintiffs' own authority supports this limitation:
16 "[a] nonparty who is nevertheless entitled to policy benefits, such
17 as an 'insured' person under the terms of the policy or an express
18 beneficiary, has standing only if [he or she] is the claimant whose
19 benefits are wrongfully withheld." Gantman, 232 Cal. App. 3d at
20 1566 (quoting Hatchwell, 198 Cal. App. 3d at 1034) (internal
21 quotations and citations omitted). As Gantman and Hatchwell
22 explain, even though Mr. Mohamed might stand to gain when M&M
23 gains, the benefits Plaintiffs seek belong only to M&M, the
24 corporation. Id. at 1568; Hatchwell, 198 Cal. App. 3d at 1034.

25 The Court finds that Mr. Mohamed is not an insured under the
26 Policy, and no exceptions in the Policy or relevant case law
27 provide otherwise. He therefore has no standing to sue based on an
28 alleged denial of the Policy's benefits. Plaintiffs' claims as to

1 Mr. Mohamed are all DISMISSED WITH PREJUDICE.

2 **B. Plaintiffs' Intentional Misrepresentation and Deceit**
3 **Claims**

4 Plaintiffs' claims for intentional misrepresentation and
5 deceit sound in fraud. They must therefore be pled with
6 particularity under Rule 9(b). This means that Plaintiffs must
7 identify "the who, what, when, where, and how of the misconduct
8 charged, as well as what is false or misleading about [the
9 purportedly fraudulent] statement, and why it is false." Cafasso,
10 637 F.3d 1047 at 1055.

11 **i. Intentional Misrepresentation**

12 The elements of a claim for intentional misrepresentation are:
13 (1) the defendant made a misrepresentation, including a false
14 representation, concealment, or nondisclosure; (2) the defendant
15 had knowledge that the statement was false; (3) the defendant acted
16 with intent to defraud or induce reliance; (4) the plaintiff
17 justifiably relied on the defendant's statement; and (5) the
18 plaintiff was damaged by that reliance. See Firoozye v. Earthlink
19 Network, 153 F. Supp. 2d 1115, 1128 (N.D. Cal. 2001).

20 Defendant argues that Plaintiffs' pleading does not meet Rule
21 9(b)'s pleading standard and, in any event, the facts pled show
22 that Plaintiffs cannot state a claim. Plaintiffs state first that
23 they met Rule 9(b)'s heightened pleading standard, noting that they
24 pled "when" the fraud claim arose: the date when Defendant denied
25 the request for burglary loss coverage. Opp'n at 3. Plaintiffs
26 also state that the "Protective Safeguards" Endorsement of the
27 Policy (the "Endorsement") -- a modification to the Policy
28 requiring that the insured maintain certain protective safeguards

1 at the property -- did not feature the symbol "P-7," which is an
2 additional alteration to the Endorsement that specifically requires
3 a "Central Station Burglar Alarm protecting the entire building."

4 Id.

5 Since the Endorsement did not include a P-7 symbol, Plaintiffs
6 assert that Defendant's denial of Plaintiffs' claim for lacking a
7 required burglar alarm has no legal or factual basis. Id.

8 However, the Endorsement does include specific exclusions stating
9 that Defendant would not pay for loss or damage caused by burglary
10 if the insured did not inform Defendant of a "suspension or
11 impairment" in any protective safeguard or if the insured failed to
12 maintain any protective safeguard against burglary or robbery "in
13 complete working order." See id. Moreover, the Endorsement
14 indicates that as a condition of the insurance, Plaintiff is
15 required to maintain applicable protective devices "as designated
16 at each premises by symbol in the Declarations," and the
17 Declarations of the Policy indeed provide that P-7 is designated
18 for Plaintiff's property even though the Endorsement page lacks a
19 P-7 symbol.

20 Even so, Plaintiffs assert that without the addition of P-7 to
21 the Endorsement pages themselves, which bear only the "P-9" symbol
22 and no description of what it means, the Policy is ambiguous. See
23 id. Plaintiff further states that ambiguities in an insurance
24 policy must be construed against the insurer, and that a limitation
25 in an insurance policy's coverage must be in understandable, plain
26 language that does not render the policy ineffectual for its
27 intended purpose (e.g., to cover property losses from a burglary).
28 Id. (citing California v. Allstate Ins. Co., 45 Cal. 4th 1008, 1018

1 (Cal. 2009); Safeway Ins. Co. v. Robert S., 26 Cal. 4th 758, 764-
2 765 (Cal. 2009)). Accordingly, Plaintiff urges the Court to
3 interpret the Policy in a way that would not require the Central
4 Station Burglar Alarm described in P-7, despite P-7's appearance in
5 the Declarations.

6 Defendant responds that interpretation of an insurance policy
7 is a question of law, citing Waller v. Truck Ins. Exch. Inc., 11
8 Cal. 4th 1, 18 (Cal. 1995), for the principle that the Policy
9 should be read according to its plain terms. Reply at 5 (citing
10 Policy at 1-95, 1-96). Defendant asserts that the Policy's plain
11 terms eliminate coverage when the insured fails to maintain
12 protective safeguards for its property (e.g., burglar alarms) or
13 fails to notify Defendant of "suspension or impairment" to a
14 safeguard. Id. According to Defendant, since the Declarations
15 require the P-7 protective measure even though the Endorsement
16 schedule lists only P-9, the plain language of the Endorsement
17 indicates that it is the symbols listed in the Declaration that
18 govern, not the schedule in the Endorsement. See Reply at 5-6.

19 The Court finds for Defendant on this issue. The plain
20 language of the Endorsement's "Condition" section states: "As a
21 condition of this insurance, you [i.e., the Named Insured M&M] are
22 required to maintain the applicable protective devices or services
23 . . . for burglary and robbery, denoted by . . . [symbol P-7], as
24 designated at each premises by symbol in the Declarations."
25 Nothing in this language purports to make the Endorsement's
26 schedule binding. Moreover, since the P-7 symbol clearly appears
27 in the Policy's Declaration, Policy at 1-09, there can be no
28 confusion: Plaintiffs were required to maintain a Central Station

1 Burglar Alarm according to P-7 under the Endorsement.

2 In this context, even absent a dispute over the Policy's
3 interpretation, the Court does not find that Plaintiffs have met
4 any of Rule 9(b)'s pleading standards as to its intentional
5 misrepresentation claim. Plaintiffs have simply not indicated any
6 facts suggesting that Defendant misled Plaintiffs as to the
7 burglary alarm requirements, or that Defendant's refusal to pay
8 Plaintiffs' claim was anything but, at best, a breach of contract.
9 Since Plaintiffs' assertions as to this cause of action are
10 implausible, and amendment would be futile, Plaintiffs' intentional
11 misrepresentation claim is DISMISSED. Plaintiffs have leave to
12 amend if they are able to plead the "who, what, when, where, and
13 how" of Defendant's alleged misrepresentations made in convincing
14 Plaintiffs to enter a contract. Since the Court's findings as to
15 the Policy's interpretation are made as a matter of law, Waller, 11
16 Cal. 4th at 18, Plaintiffs may not re-plead a misrepresentation
17 claim based on the same legal theory dismissed above.

18 **ii. Deceit**

19 Plaintiffs' claim for deceit is difficult to distinguish from
20 their claim for intentional misrepresentation, because "deceit" and
21 "intentional misrepresentation" are two terms for the same tort of
22 fraud. 5 Witkin, Summary of Cal. Law Torts § 772, p. 1121 (10th
23 ed. 2005) ("The elements of fraud, which give rise to the tort
24 action for deceit, are (a) misrepresentation (false representation,
25 concealment, or nondisclosure); (b) knowledge of falsity (or
26 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d)
27 justifiable reliance; and (e) resulting damage.").

28 However, based on the subtitle for Plaintiffs' claim

1 ("entering into insurance contract with no intent to perform") as
2 well as the claim's substantive allegations, it appears that
3 Plaintiffs are pleading a claim for promissory fraud, and the Court
4 will therefore construe Plaintiffs' claim liberally to avoid its
5 being merely duplicative of Plaintiffs' deficient intentional
6 misrepresentation claim. "Promissory fraud is a subspecies of the
7 action for fraud and deceit. A promise to do something necessarily
8 implies the intention to perform; hence, where a promise is made
9 without such intention, there is an implied misrepresentation of
10 fact that may be actionable fraud." Lazar v. Super. Ct., 12 Cal.
11 4th 631, 638 (Cal. 1996) (quotations and citations omitted). "An
12 action for promissory fraud may lie where a defendant fraudulently
13 induces the plaintiff to enter into a contract." Id. (quotations
14 and citations omitted).

15 Defendant argues that Plaintiffs fail to plead this claim with
16 specificity, and that in any event, Plaintiffs' facts do not
17 support their claim. In opposition to Defendant's argument on
18 specificity, Plaintiffs copy and paste their allegations from the
19 complaint. See Opp'n at 4 (quoting Compl. at 11).³ These
20 allegations concern Plaintiffs' arguments as to the omission of P-7
21 from the Policy's modifications as to protective systems, as
22 described above. See id. Plaintiffs assert that the absence of P-

23
24 ³ Defendant objects to Plaintiffs' quoting this section of the
25 complaint in their opposition brief in support of the deceit claim,
26 because that page of the complaint, the "Exemplary Damages
27 Attachment," does not state that it incorporates by reference the
28 other pages of the complaint. Reply at 4 n.3. The Court
disregards this argument. Plaintiffs' pleadings were evidently
clear enough to enable Defendant to understand the nature and
extent of the incorporation. In any event, if Plaintiffs re-plead
their complaint, they should make their incorporations by reference
clearer.

1 7 proves that Defendant intended to defraud Plaintiffs, since,
2 according to Plaintiffs, there can be no other credible or logical
3 explanation for Defendant's denial of Plaintiffs' claim. Id.
4 Apart from those facts, the remainder of Plaintiffs' deceit
5 pleadings are purely conclusory statements, like the allegation
6 that Defendant omitted P-7 "intentionally with malice, fraud, and
7 oppression." Id.

8 None of Plaintiffs' allegations about deceit or promissory
9 fraud are plausible or specific enough to state a claim. Again,
10 since the Policy Declaration requires a Central System Burglar
11 Alarm, Plaintiffs have pleaded at most a breach of contract if they
12 indeed had such a system in place. Plaintiffs insist the facts of
13 the complaint and the relationship between insurer and insured lead
14 to a conclusion that Defendant must have meant to defraud
15 Plaintiffs, but the Court finds this untenable: a claim sounding in
16 fraud must show much more than this to be plausible. Further,
17 regardless of whether Plaintiffs meant their deceit claim to be an
18 alternative to their fraudulent misrepresentation claim or, more
19 properly, a promissory fraud claim, the deficiencies of their
20 pleadings as described above render the claim unsupportable.

21 Plaintiffs' deceit claim is DISMISSED. Plaintiffs have leave
22 to amend if they are able to correct the factual deficiencies
23 described above. If Plaintiffs do re-plead this claim, they should
24 clarify exactly what tort they are pleading, and they must also
25 keep in mind that (as above) the Court's interpretation of the
26 Policy is a matter of law.

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1 **V. CONCLUSION**

2 For the reasons explained above, the Court GRANTS Defendant
3 AMCO Insurance Company's motion to dismiss Plaintiffs Mohsen
4 Mohamed and Oakland M&M, Inc.'s complaint. All of Plaintiffs'
5 claims as to Mr. Mohamed are DISMISSED WITH PREJUDICE. Plaintiffs'
6 intentional misrepresentation and deceit claims are DISMISSED with
7 leave to amend, per above. Plaintiffs' breach of contract and
8 breach of the implied covenant of good faith and fair dealing
9 remain in the case as to Plaintiff Oakland M&M, Inc.

10 Plaintiffs have thirty (30) days from this Order's signature
11 date to file an amended complaint. If they do not, the deficient
12 claims may be dismissed with prejudice.

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14 IT IS SO ORDERED.

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16 Dated: April 22, 2013



UNITED STATES DISTRICT JUDGE